

NTSB Order No. EA-4963

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of March, 2002

Respondent .

Dockets SE-16488
and SE-16497

The respondent and the Administrator have both appealed from the oral initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on February 21, 2002, at the conclusion of an evidentiary hearing.¹ By that decision the law judge modified two emergency orders of the Administrator respecting several certificates held by respondent. The first

7452

order immediately suspended respondent's Airline Transport Pilot (ATP) certificate until such time as she provided personal flight-time records requested first in August 2001, following her involvement in an accident in a gyroplane on July 31; and the second order revoked that certificate and three others for, among other things,² her operation of an aircraft after the suspension imposed in the first order was in effect. The law judge determined that both orders should provide for six-month suspensions of only the ATP certificate.³ For the reasons discussed below, the appeal of the Administrator is granted, and the appeal of the respondent is denied.⁴

The Administrator issued an emergency order suspending respondent's ATP certificate on January 25, 2002. It alleged that respondent had violated section 61.51(i)(1) of the Federal

²The second order also alleged that respondent, contrary to the requirement in FAR section 61.19(g), had not surrendered her ATP certificate as directed in the first order. That regulation states the holder of a suspended or revoked certificate must return it to the FAA when so requested by the Administrator.

³The Administrator's revocation order revoked respondent's ATP, Ground Instructor, Flight Engineer, and Flight Instructor certificates. The law judge's decision purports to limit the reach of any suspension to respondent's ATP certificate alone. We do not understand the rationale for this unexplained attempted limitation, since the privileges of a flight engineer or a flight instructor certificate could not be exercised without a valid pilot certificate. In addition, it is not clear to us why the law judge would alter the suspension order to provide for a six-month suspension. Apart from the fact that the Administrator did not intend the suspension for failing to provide flight records to extend beyond the provision of such records, the revocation order essentially replaced the suspension order.

⁴The Administrator filed a reply opposing the respondent's appeal. The respondent did not file a reply to the Administrator's appeal.

Aviation Regulations, "FAR," 14 C.F.R. Part 61, because she had failed to comply with three requests (August 7, October 25, and December 7, 2001) and a subpoena (issued August 28, 2001) for pilot logbooks showing all of her flight time.⁵ The suspension was to run until the requested records were delivered to the Administrator for inspection.⁶ On February 8, 2002, the Administrator issued an Emergency Order of Revocation, in which she alleged, among other things, that despite the respondent's receipt, on January 28, of the Emergency Order of Suspension, she gave flight instruction to a student, on February 6, in disregard of the suspension order and FAR section 61.3(a).⁷

On appeal, respondent, by counsel, argues that the emergency order of suspension was invalid because the Administrator's prior requests and subpoena sought logs or records showing "all" of respondent's flight time. Since, the argument goes, respondent

⁵FAR section 61.51(i)(1) states that "[p]ersons must present their pilot certificate, medical certificate, logbook, or any other record required by this part for inspection upon a reasonable request by" among others, the Administrator.

⁶No written response from the respondent to any of the Administrator's requests for the flight logs was made.

⁷FAR section 61.3(a) provides, in pertinent part, as follows:

§ 61.3 Requirement for certificates, ratings, and authorizations.

(a) *Pilot certificate.* A person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of U.S. registry, unless that person has a valid pilot certificate or special purpose pilot authorization issued under this part in that person's physical possession or readily accessible in the aircraft when exercising the privileges of that pilot certificate or authorization....

no longer maintains a log of all of her flight time, and is not required to, the requests were invalid and, as a result, both the suspension and derivative revocation based on her failure to comply with the requests are legally deficient. The argument is meritless.

The Administrator's requests were not rendered invalid because they sought more information than respondent keeps or is required to keep; they simply did not have to be complied with *to the extent* that they were overbroad and could not be fulfilled. Respondent was obligated, whether or not she still logs flight time she's not required to log, to produce the flight records Part 61 does require her to maintain, such as those that demonstrate recent flight experience in all of the aircraft she operates (see section 61.51(a)(2)), including the helicopters in which she provides sightseeing and flight instruction services and the gyroplane she was operating with a passenger on board when she had the accident that triggered the requests for her flight logs.⁸ Respondent provided *no* flight records that satisfied her obligation to document and record recent flight

⁸Moreover, respondent has not identified any reason why she did not or could not have produced for inspection the flight logs she maintained before she ceased logging flight time. Respondent holds a multitude of FAA certificates and ratings, and we assume that she has retained records demonstrating the "[t]raining and aeronautical experience used to meet the requirements" for their issuance under Part 61. See FAR section 61.51(a)(1). If she has not, any effort she might undertake in the future to re-qualify for the certificates the Administrator has in this proceeding revoked will be lengthy and expensive.

experience and flight review requirements.⁹

Respondent also contends, in effect, that her certificates should not be revoked because, she insists, she did not learn of the issuance of the January 25 emergency suspension order, which her attorney appealed to the Board on January 30, until after she had conducted the helicopter instruction flight on February 6. Respondent does not, in this connection, dispute that she had constructive notice of the order on or about January 28, 2002, when her mother, who handles various business tasks for respondent, including mail and "the books," picked up the certified mail containing it.¹⁰ Rather, she maintains that neither her mother nor her lawyer showed the order to her or discussed it with her before February 6.¹¹ Although he made no

⁹At the hearing, respondent submitted what was represented to be a page from her diary that, she asserted, reflected a flight record relating to the gyroplane that had previously been provided to the Administrator along with certain aircraft-related records. Assuming, despite the abundant and persuasive evidence to the contrary, that this document (Respondent's Exhibit 1), not referenced by respondent before the hearing on the emergency suspension order, was given to the inspectors investigating the accident but was somehow overlooked, it changes nothing, for the brief, cryptic diary page notations do not meet the explicit information requirements the Administrator has established by regulation for such records in FAR section 61.51(b). Incredibly, the law judge appears to have viewed the production of this document as a "good faith effort" by respondent to comply with the Administrator's flight information requests. See Initial Decision at 366. We do not.

¹⁰Respondent has a business known as K.D. Helicopters, Inc., which operates both helicopters and airplanes for various commercial purposes, but is principally involved in helicopter instruction.

¹¹Both of the Administrator's inspector witnesses testified that the student with whom respondent was flying on February 6, Wayne Tanis, advised them the next day that the respondent had

explicit credibility finding against the respondent on this issue, the law judge demonstrated his rejection of her claim of no knowledge¹² by imposing a six-month suspension of her ATP certificate.¹³ While we share the law judge's view that "flying when . . . her certificate [was] under suspension . . . cannot be overlooked" (I.D. at 366), we do not agree with his modification of sanction. As no basis appears in this record for not deferring to the Administrator's choice of sanction, revocation will be reinstated.

Knowingly operating an aircraft while under suspension is one of the most serious violations an airman can commit, for it reveals, perhaps as no other offense does, contempt for the laws

(..continued)

told him that she had been suspended but that it was alright for her to fly with him. See Transcript at 122, 133. Subsequently, Mr. Tanis, who apparently paid for a limousine to take himself, respondent and her mother to the hearing, testified that he did not know of the suspension until the day the inspectors interviewed him.

The inspectors also testified that they were waiting at the respondent's home base airport in Blairstown, NJ when respondent approached to land with her student. On observing the inspectors, respondent, according to their testimony, directed a rude gesture in their direction and flew away.

¹²We fully agree with the law judge that the evidence demonstrates a knowing violation. Indeed, we find respondent's insistence that she remained clueless about an emergency suspension a week after her mother learned of it, and her lawyer had filed an appeal on her behalf from it, to be inherently incredible.

¹³In most cases, we would assume that a sanction would not be pursued, or even necessarily warranted, for an operation conducted by an airman who was genuinely unaware that his certificate had been suspended, although the Administrator might in such circumstances seek a minor suspension for the technical violation of flying without a valid certificate.

that govern the exercise of the privileges granted to the holder of a certificate and for those responsible for enforcing those laws in the interest of air safety. This respondent's disdain for the authority applicable to her aviation activities is doubly evident in this case. First, and notwithstanding the law judge's irrelevant and flawed assessment that respondent's refusal to provide requested flight records in itself "didn't pose any threat or hazard or menace to [her continuing] in aviation" (I.D. at 366), her lack of compliance and cooperation in forwarding repeatedly-requested records she is required by law to possess and make available for inspection has, for more than half a year, effectively blocked the Administrator's necessary and appropriate efforts to determine whether pilot competence was a factor in the gyrocopter accident.¹⁴ Second, respondent's defiant decision to fly when grounded by a suspension the Administrator had issued on an emergency basis, an extraordinary circumstance which underscored the importance the Administrator attached to respondent's expedited attention to the matter, establishes that she cannot be trusted to conform her behavior to the rule of law.¹⁵ Such a lawless individual unquestionably lacks the care,

¹⁴At the hearing, respondent, without elaborating on her reasons, simply stated her view that the Administrator's request for her flight records was unreasonable. Since respondent could easily have ended the emergency suspension immediately by turning over the requested records, we suspect she had no records establishing that she was qualified to be piloting the gyrocopter on July 31, 2001, but believed she would get in more trouble by admitting that than by stonewalling on the request.

¹⁵This may be the first occasion we have had to review an appeal involving an operation during an emergency suspension.

judgment, and responsibility required of a certificate holder.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;
2. The Administrator's appeal is granted;
3. The initial decision is reversed to the extent it is inconsistent with this opinion and order; and
4. The Administrator's Emergency Order of Suspension and her Emergency Order of Revocation are affirmed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and BLACK, Member of the Board, concurred in the above opinion and order. HAMMERSCHMIDT and GOGLIA, Members, did not concur, and Member GOGLIA submitted the following dissenting statement, in which Member HAMMERSCHMIDT joined.

I dissent.

This case is about Respondent's failure to present her logbooks showing flight time. The Administrator's brief concludes that the Administrator's proposed penalty should be upheld because "Respondent's decision to fly on February 6, 2002 shows a complete disregard for the Federal Aviation Regulations. Consequently, the Emergency Order of Revocation must be affirmed." However, in arriving at this conclusion the Administrator disregards the finding of the Administrative Law Judge that "this is a very odd and somewhat different type" of case, and the finding that Respondent seldom saw any of her mail or correspondence pertaining to the operation of her business. The Administrator disregards the ALJ finding that the Respondent is "a very experienced airman" with "an exemplary record....who has been flying since she was 16 years old". The Administrator also disregards that Respondent sent all numerous other records requested by the FAA and that these records did satisfy the FAA's requests (Tr. 43,60-61). The Administrative Law Judge was convinced that there was nothing "aggravating about this case", that the Respondent made a "good faith" effort to comply with the Administrator's request and that the Administrator's requested sanction was too harsh after seeing and hearing the witnesses.

There is nothing in this case that is sufficient to justify overriding the deference given by the Board to the decisions of the Administrative Law Judge, and the Administrator has presented no precedent that removes the Administrative Law Judge's discretion in this case. I would be careful to preserve the distinction between the attorneys for the Administrator who advocate strong administrative penalties, and the Administrative Law Judges who have the responsibility and authority to decide the cases. Hearings are not merely an opportunity to present testimony before the sanctions requested by the Administrator are imposed. The Administrative Law Judge disagreed with the Administrator's position. The decision may also be a reaction to the harsh consequences of the application of the Administrator's 'constructive notice' rule. Whether or not the Respondent in this case actually knew of the contents of letters that were received by Respondent's mother and forwarded to her attorney for handling, it would be better for aviation safety, in general, if the Administrator accepted more responsibility for the successful delivery of messages to airmen. Whether or not confusion was caused by the FAA's letter to Respondent dated January 15, 2002 (about the same time as the suspension) that the FAA's investigation of her had been closed and that no legal action would be taken against her, and whether or not confusion may have existed about any missing small part of the FAA's request for information, such matters could have been cleared up with a phone call that may have avoided this case in its entirety.

I would uphold the decision of the Administrative Law Judge. I note from the record that the suspension of the Respondent's airline transport pilot certificate was exactly what the Administrator initially requested in its initial complaint dated January 25, 2002, and that there is nothing in the record evidencing facts or circumstances occurring in the one week after that date until the Amended Complaint dated February 2, 2002 to justify or explain the change in the proposed penalty from suspension to revocation, or to explain or justify why the Administrator sought at that date to add, not merely the suspension but also the revocation of the ground instructor certificate, the flight engineer certificate, and the flight instructor certificate.